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EXHIBIT 2
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HB 408

# Medical Liability Reform
# Key Points and Legislative Proposals

## Introduction

Access to high quality and affordable medical treatment is key to the health and well-being of Montana's residents and to economic growth in our state. However, recruiting and retaining the qualified medical providers needed to achieve this goal is increasingly challenging – due in part to our state's medical liability climate.

The lack of access to reasonably-priced medical malpractice insurance makes provider recruitment and retention challenging. In addition, liability insurance premium increases have historically forced physicians and other providers in Montana to consider either curtailing certain medical services or relocating to states whose premiums are more stable.

Roughly 40 percent of medical liability claims reflect alleged bad outcomes and are not the result of medical malpractice. Physicians should not be expected to shoulder all of the inherent risks associated with human illness and medical treatment – yet all too often, they do.

The state of Montana has a compelling interest in ensuring that its residents receive high quality and reasonably-priced medical treatment. This package of bills addresses several critical areas that will help us achieve this goal.

## Legislative Proposals

**(1) Offset of Personal Consumption Expenses (HB 275, Rep. Scott Reichner).** Two types of actions may be brought following the death of an individual due to another's negligence. A "survival action" is brought on behalf of the decedent's estate for damages personal to the decedent, and a "wrongful death action" is an action brought on behalf of a decedent's survivors for the survivors' damages resulting from the loss of the decedent.

In Montana, a survival action and a wrongful death action must be combined into one legal action, and any element of damages may only be recovered once.

In a wrongful death action damages are recoverable for the loss of the decedent's support, and so economic consumption (i.e., the decedent's prospective personal expenses) may be deducted from the damage award.

In a survival action damages are recoverable for the deceased's medical and funeral expenses, pain and suffering of the deceased up to death, and future lost earnings; however personal economic consumption is not deducted in the calculation of future lost earnings of the decedent.

Practically speaking, in most cases, there is little difference between future support and future earnings.

**Legislative Proposal:** Future lost earnings calculations in survival actions would be reduced by expenses for personal consumption.

**(2) Defensive Medicine Reduction (HB 405, Rep. Janna Taylor).** The practice of "defensive medicine" occurs when physicians attempt to anticipate all possible outcomes by prescribing, recommending or ordering tests, procedures or other therapeutic interventions as a safeguard against possible malpractice liability. It arises out of the fear of litigation.

An overwhelming majority of physicians admit to practicing defensive medicine regularly. The costs of defensive medicine are estimated to be from $45 to $126 billion annually nationwide.

The law should encourage physicians to provide their patients with the care they need, based on the provider's clinical judgment at the time care is delivered – so long as that care meets the standard of care.

A medical record is a legal record in which physicians document all the care they deliver to a patient and provide other information related to services delivered to patients. The medical record is used in medical malpractice actions to determine whether a physician's treatment of a patient meets the standard of care; it is the proper place for physicians to note their rationale for prescribing, recommending or ordering a given test, procedure or other therapeutic intervention.

Reducing defensive medicine practices could significantly reduce the cost of medical care in all parts of the health care system, including Medicaid, workers' compensation and the state employee health insurance plan.

**Legislative Proposal:** Physicians would be provided civil immunity from tort liability when, at the point of care, the physician notes in the medical record the physician's rationale for not prescribing, recommending, or ordering a given test, procedure or other therapeutic intervention – so long as that rationale meets or exceeds the standard of care.

**(3) Timely Filing & Resolution of Medical Liability Claims (HB 408, Rep. Cary Smith).** Under current Montana law, the statute of limitations for medical malpractice is three years. Surrounding states – Idaho, Wyoming, North Dakota and South Dakota – all have statutes of limitations of two years for medical malpractice actions. Reducing Montana's statute of limitations will place Montana on a level playing field with surrounding states by reducing the length of time physicians, hospitals, and other providers are subject to unknown medical liability.

**Legislative Proposal:** Decrease medical malpractice statute of limitations to 2 years.

**(4) Medical Liability Protection for Hard-To-Recruit Subspecialists (HB 464, Rep. Mark Blasdel).** The Children, Families, Health and Human Services Interim Committee explored a safe harbor approach for medical malpractice protections during the 2009-2010 interim. This bill somewhat narrows the approach reviewed by the interim committee by applying a sort of safe harbor protection to types of positions that are difficult for Montana health care providers and hospitals to recruit. The types of subspecialists that would be protected by this legislation include pediatric and geriatric subspecialists such as a pediatric neurosurgeon. One difficulty in recruiting these subspecialists is the medical liability exposure to which they are subject. By reducing this exposure, Montana would become a more attractive option for these subspecialists. This legislation would raise the evidentiary standard to clear and convincing in medical malpractice actions against

certain subspecialists. A clear and convincing standard is a higher burden of proof than a preponderance of evidence, but less than beyond a reasonable doubt.

**Legislative Proposal:** Provide additional protection against medical liability exposure for pediatric and geriatric subspecialists.

**(5) Revision of Comparative Negligence Statutes (LC 1129, Rep. Fitzpatrick).** Under Montana's current comparative negligence statute, in a case with multiple defendants, one defendant may settle or be released from liability. If the remaining defendant chooses to take the case to trial and have the settled party's degree of negligence considered by the jury he must follow the provisions of existing section 27-1-703, MCA, and has the burden to prove the plaintiff's case against the settled defendant. This can result in the plaintiff's chosen trial date being vacated due to the necessity of obtaining expert witness testimony to build the case of the settled party's negligence. If the remaining defendant is successful in proving that the settling defendant was negligent, all parties are assigned a percentage of liability. This is a reasonable way to prevent "sweetheart" settlements.

However in many situations it can be wasteful and cumbersome and defeats the purpose of settlement if the settling party's name is brought back into court. Without a dollar-for-dollar offset as an alternative, and, in the case of health care providers who may be doctors practicing together, it requires them to turn against each other and attempt to prove the other was more negligent. In those instances, resources are best used in litigation when each party proves or defends his own case, rather than the non-settling doctor not only preparing his defense, but also attempting to prove his co-defendant was negligent.

The current proportional liability scheme while protecting against sweetheart settlements does not work as well where multiple parties all have adequate insurance and the settling party does not obtain his bargained for peace.

If this legislative proposal is enacted, once a party settles or is released from liability, the remaining defendant will be allowed to make a measured and calculated decision regarding whether he too wishes to settle or proceed to trial. Knowing the amount of settlement allows the remaining defendant to make an election to choose: a dollar for dollar offset or a percentage liability based on their analysis of their defense and risk, rather than a guessing game of whether to proceed to trial.

**Legislative Proposal:** In cases where at least one defendant settles or is released from liability, the remaining defendant(s) may choose to bring the settling party back in to prove their share of negligence or make an election to receive a dollar for dollar offset.

**(6) Providing for Confidentiality of the Proceedings of Quality Assurance Committees of Medical Practice Groups (HB 416, Rep. Harry Klock).** Quality assurance activities in medicine are intended to provide a venue for open discussion and evaluation of patient care activities for the purpose of improving the quality of care. To ensure that providers feel free to thoroughly investigate and discuss all aspects of patient care, it is critical that the information discussed in these settings be protected from discovery in a civil action. Without legal protection from discovery, health care providers and administrators are unwilling to disclose sensitive information and address critical issues that affect patient care.

In Montana, medical institutions (e.g., hospitals, nursing homes) that have formally structured quality assurance programs benefit from the confidentiality of such activities. However, medical group practices do not enjoy the same protection as institutions which stifles quality assurance activities. As a result, physicians are unwilling to develop quality assurance committees within medical practices. This lack of protection creates a disincentive to providing better patient care.

The way in which health care is delivered is changing: more care is being delivered outside of the hospital, and hospitals and medical practices are collaborating much more to provide comprehensive care. In this new paradigm, it is imperative that medical groups and hospitals are able to work similarly to improve patient care by having the same protection for their quality assurance activities.

**Legislative Proposal:** Provide that the proceedings of a quality assurance committee of a medical practice group, the data it produces, and the material it considers be confidential and not subject to discovery or introduction into evidence in any civil action against a health care facility or a provider of professional health services that results from matters which are the subject of evaluation and review by the quality assurance committee.

**(7) Nonduplication of Payments (LC 1133, Rep. Fitzpatrick).** This bill is similar to SB 458 from the 2009 legislative session. It seeks to avoid multiple payments from health and other insurers to an injured party for a single expense. It is recent practice in Montana for an injured person to receive payment by a secondary insurer after his medical bills have already been paid by a first party insurer under the theory he has not been "made whole". For example, if an individual was injured in a car accident, even though medical providers have already been paid for services provided by the automobile insurance, the injured party seeks duplicative benefits from his own health insurer. This legislation would ensure that injured parties receive the benefit they are entitled to and the costs are covered, but would not allow injured parties to receive multiple payments from other carriers.

**Legislative Proposal:** Prevent multiple payments for a single expense.

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